SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 424.

I. A. WATSON, JR., T. W. NORTHCROSS, SR., W. D. SPEIGHT, JR., A. E. HORNE, SR., MELVIN MALUNDA, JOHNNY GHOLSTON, HAROLD GHOLSTON, ALFRED HAYNES, JR., JOHN ROGERS, THOMAS PUGH and CURTIS KING, on Behalf of Themselves and Others Similarly Situated,
Petitioners,

vs.

CITY OF MEMPHIS, a Public Body Corporate, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

QUESTION PRESENTED.

No constitutional question is involved in this case. Respondents fully recognize and are actually applying the established principle of constitutional law that Negroes are entitled to make use, on a desegregated basis, of public parks and recreational facilities of the City of Memphis.

The only question presented in the lower courts in this suit seeking injunction to require immediate and complete desegregation of the races in all the public parks and recreational facilities operated by respondents was whether the Trial Judge had the discretionary right, under the undisputed proof in this case, to deny the relief sought and to approve plan of gradual integration.

STATEMENT OF THE CASE.

The Trial Court did hand down an Opinion (forming part of the Judgment) and this Opinion is attached hereto (App. 1b). Petitioners make no attack on the correctness of the Trial Court's Findings of Fact; therefore, we assume that all Findings may be accepted as having been sustained by competent proof. Reference to the Trial Court's Findings need be made for proper determination of the question herein involved.

The City of Memphis has a population of approximately five hundred thousand (500,000), thirty-seven per cent (37%) of which are Negro, and sixty-three per cent (63%) are White (1960 Census). Memphis is located in the extreme southwest corner of Tennessee and is bounded on the west by Arkansas and the south by Mississippi. The population of the adjoining counties in Arkansas, Mississippi and West Tennessee is predominantly Negro (App. 106a).

There are 131 parks owned by the City of Memphis and operated by Memphis Park Commission, 108 of which are developed and in use. At the time of trial, 25 of these parks were integrated, including Zoo, Art Gallery and McKellar Lake Boat Dock. As respects the balance, with very few exceptions, the parks reserved for Negroes are in neighborhoods which are completely or predominantly Negro; and likewise, the parks reserved for White people are in neighborhoods which are completely or predominantly White. In the City of Memphis, the races are separated by neighborhoods, and the Park Commission has consistently followed neighborhood patterns in providing recreational facilities for members of both races; and it has been its policy to remove restrictions applicable to Negroes as neighborhoods are converted, by voluntary action, from White to Negro, as early as practicable (App. 106a, 107a).

Recreational facilities operated by the Memphis Park Commission were set out in the Trial Court's Findings of Fact. These facilities include 10 swimming pools—5 reserved for White use and 5 for colored; but since the trial, the swimming pool in Malone Park has been changed from White to Negro, leaving 6 swimming pools for Negroes and 4 for White. Respondents operate 61 playgrounds on City owned property—40 reserved for White use and 21 for use by Negroes—together with 56 playground facilities operated by the Park Commission on property owned by churches, private groups and the School Board—30 of which are reserved for White use and 26 for Negro. At the time of trial, there were 12 community centers with gymnasiums on City owned property—8 of which were reserved for White use and 4 for colored; but, as pointed out by the Court of Appeals, the Gaston Community Center, formerly reserved for White use, has been changed since the date of trial in the District Court. All 7 of the City owned golf courses, under the plan as approved by the Trial Court, will be fully desegregated by January 1, 1964. At the present time, 3 of the 7 golf courses are already integrated[1] (App. 107a, 108a, 109a).

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[1] The fact that no Negro will be denied the privilege of playing golf during transition period is fully shown in the proof. At time of trial in the District Court 5 of the 7 golf courses were reserved for White use and 2 for colored. In 1960, out of a total of 232,413 golf players on the 7 City courses less than 13,000 were Negroes; thus, Negroes, comprising less than 6% of the golf players, used approximately 30% of the public courses (App. 51a, Exhibit 4), and Fuller Golf Course, formerly used only by Negroes, but integrated, under the plan approved by the Trial Judge, on February 1, 1962, is the finest in Memphis and potentially one of the best in the United States (App. 74a).

A similar situation existed with respect to those Negro plaintiffs who claimed discrimination in use of tennis courts. At the time of trial, those plaintiffs were playing tennis at Gooch Park and others without charge, whereas, there was an admission fee at John Rogers Tennis Courts (formerly reserved for Whites); and the Gooch court was much closer to their homes (App. 32a, 34a,

In making the transition from a predominantly segregated park system to an integrated system, respondents concluded, following much study, and after desegregation of such citywide facilities (as distinguished from neighborhood parks and playgrounds), as the Zoo, Art Gallery and McKellar Lake Boat Dock, that the 7 public golf courses and Fairgrounds Amusement Park should be next desegregated. This program was evolved because these facilities involved areas which were less sensitive in the matter of race relations than other areas, and which were less likely to cause confusion and turmoil in the transition period (App. 54a). Respondents' plan as submitted to the Trial Court took into account also that it would have been unfair to desegregate Fairgrounds Amusement Park in the middle of the year because of the effect it would have had on rights of certain concession holders who operate under contract with the Park Commission (App. 49a). Other reasons in support of gradual integration are set out in testimony of Harry Pierotti, Chairman of the Park Commission, and H. S. Lewis, Director of Parks (App. 54a, 55a, 56a, 75a, 82a, 83a, 84a).

The Recreational Department of the Memphis Park Commission is rated by competent authorities as the best in the South. Its recreational program for Negroes is the finest in the country. Approximately 100,000 children participate in one or more of the recreational activities sponsored by the Memphis Park Commission, and of this number approximately 35,000 are Negroes. The Recreational Department of the Park Commission sponsors many and varied types of recreational activities, including, but not limited to, competitive sports, such as baseball and basketball, dancing, and many other activities. The Recreational Department headquarters itself is operated on

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36a). Under the plan, John Rogers Tennis Courts were integrated January 1, 1962, in accordance with suggestion of the Trial Court (App. 111a).

an integrated basis, and all Negro Supervisors and Directors are paid on the same salary schedule as the White Supervisors and Directors; and the qualifications for such Negro Supervisors and Directors are equal to or greater than that of their White counterparts (App. 108a).

In finding that respondents were acting in good faith in recognizing constitutional rights of Negroes to use of public parks and facilities on an integrated basis, the Trial Court gave consideration to the following:

(1) Importance of time to accomplish change-over from a partially segregated system to an integrated one.

(2) Good will and understanding heretofore obtaining between the races.

(3) The fact that, pending the transition period now in progress, ample recreational facilities, under the operation of the Park Commission, will be available to all Negro citizens of Memphis, and no Negro will be denied the right to avail himself of those facilities.

(4) Maintenance of law and order.

(5) Avoidance of confusion and turmoil in the community.

(6) Revenues available from concessions operated on park property.

(7) The fact that immediate integration would result in a denial to a substantial number of citizens, both Negro and White, of an opportunity to avail themselves of recreational facilities now afforded to all citizens of Memphis.

(8) The constitutional and other legal rights of all citizens, both White and Colored (App. 110a).

The Trial Judge found as a fact that "immediate forced integration of all facilities of the Park Commission would

be unwise under all the circumstances as presented by the proof. The plans and programs evolved by the Park Commission properly take into account the constitutional rights of Negro citizens without overlooking many other factors, as hereinabove set out" (App. 110a).

Although no attack is made on the correctness of the lower court's Findings of Fact, it is significant that the proof showed, without dispute, that immediate forced integration of all races in all parks and facilities would (1) seriously impair the good will and understanding that has heretofore obtained between the races in the City of Memphis[2] (App. 50a); (2) result in a denial to a substantial

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[2] Marion Hale, Superintendent of Recreational Department of Memphis Park Commission, with 36 years' experience in field of public recreation, testified:—

"Q. Now, Mr. Hale, with reference to this integration problem, and you recognize there is a problem you have to face in your work, do you not?

A. Yes, sir.

Q. What effect, Mr. Hale,—and I want you to base your answer on the years of experience you have had in the recreation field dealing with both white and colored, would forced integration, immediate integration, have on the recreation department of the Memphis Park Commission?

A. From my years of experience, Mr. Lawyer, sudden recreation will create havoc.

Q. You mean sudden integration?

A. I mean sudden integration.

I think we have a problem and me and my staff realize we have a problem, and we are continually observing these problems and trying to work them out, but if you were to order immediate integration of all our playgrounds no telling what would happen.

I have heard it discussed about the violence and we all know that is true.

I think there is another point that is important, is to see the relationship broken down between the white and the colored. A relationship that we have worked so hard to build up. A friendship, that through my thirty-six years has become increasingly fine, and I think that many, many playgrounds—I don't think it, I know it.—would have to be closed down and I think that you would need more supervision.

I think you would have lots and lots of violence, and irregardless of who started it the violence will be there. I think your playground system, if we integrate suddenly, would be

number of Negro citizens, as well as White, of recreational facilities now available;[3] (3) create great difficulties

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ruined. If we had a little time to give some deep thought and consideration where we can work this thing out harmoniously for the good of both races where we can work it out and ponder over it and do it on a gradual basis.

Q. Have you discussed this with your Negro supervisors?

A. I have discussed it many times.

Q. Are they in accord with your thinking?

A. Well, I have—I would hate to answer that question. Yes, I would say they are in accord with my suggestion here on the stand. Especially the supervisors."

(Transcript of Evidence, pp. 214-216.)

[3] H. S. Lewis, Director of Parks, has been operating head of the Memphis Park System for 16 years (App. 72a). Before that time he had considerable experience in recreation work (App. 85a). He testified:—

"Q. If you are forced to integrate all of these recreational facilities, in your opinion, Mr. Lewis, based on your dealings with white and Negro alike, would that result in a denial to these thirty-five thousand Negro children of substantial recreational facilities which they have been enjoying?

A. In my opinion, it will, yes.

Q. Why do you think that is true, Mr. Lewis, and I will ask you first if you are forced into that situation now without being able to exercise any discretion of your own, would you have to have more or less supervisors and instructors?

A. You would have to have considerably more.

Q. What about policemen to patrol the various playgrounds and parks?

A. In my opinion, we would have to have considerably more policemen.

Q. Since opening up the Zoo, have you had to increase the police protection there?

A. We have.

Q. And if every other facility in Memphis were opened up, in your opinion, would it also have to be increased?

A. It would.

Q. And would that or not be a burden upon all the people of the City of Memphis?

A. It would be a tremendous burden, yes.

Q. In your opinion, Mr. Lewis, is it going to take considerable time and a whole lot of patience and understanding for you and the other people who head the Park Commission to try to work out this problem of racial integration in the public parks?

A. It will, quite a bit.

Q. Is it your desire to offer to every Negro child in Mem-

in maintaining law and order, while this difficulty will be greatly diminished if integration is carried out on a gradual basis (App. 101a, 102a).

Petitioners introduced no proof whatever to refute the showing made by respondents that harmful effects to both

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phis the same treatment, the same facilities that are offered to the white people?

A. That is what we try to do to the best of our ability.

Q. And is that the established policy of the Park Commission?

A. That is the policy, yes.

Q. Now, Mr. Lewis, have you worked with children quite a bit in your capacity as head of the Park Commission?

A. I have.

Q. And the Park Commission is necessarily closely related and deals closely with many children, as you mentioned, about a hundred thousand?

A. Right.

Q. If the recreational program of the Memphis Park Commission is impaired by forced integration, what effect, in your opinion, would that have on these thirty-five thousand Negro children and sixty-five thousand white children?

A. We would have to, under the present budget, reduce the number of playgrounds drastically in order to give them full protection.

Q. And would that, or not, result in a denial of recreational facilities to a great number of children, white and Negro?

A. It would.

Q. And in your opinion, would that have some relation to juvenile delinquency then?

A. It certainly would.

Q. It speaks for itself, doesn't it?

A. Right.

Q. Do you try to keep as many children off the streets as you can during the summer vacation period?

A. That is the purpose of our program, yes.

Q. And is one of the purposes of that to cut down on juvenile delinquency?

A. It is, yes.

Q. For all children?

A. All children.

Q. Now, Mr. Lewis, you have studied this problem in other cities in the country, both north and south?

A. I have.

Q. And is your opinion based upon a survey of other cities as well as your experience here in the City of Memphis for the last sixteen years?

A. It is."

(App. 83a to 85a.)

Negro and White people would follow if immediate integration of the races in all parks and facilities were ordered. As the Trial Judge, in his Opinion, so aptly stated:

> "No valid objection to this plan, in the Court's opinion, is offered in this case. The plaintiffs merely say they want all these facilities fully integrated now. Nothing else seems to matter."
>
> (App. 3b.)

"PINK PALACE MUSEUM".

The City of Memphis acquired "Pink Palace Museum" and property on which it is located by deed dated August 2, 1926 from Garden Communities Corporation. This deed provided that the property should be used for benefit of White persons only and it reserved right of re-entry for breach of such condition or covenant.[4]

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[4] Said deed provided:—

"(c) Said building and grounds shall be devoted wholly and exclusively to public uses for the benefit of persons of the Caucasian race only and as a convervatory (sic), art gallery, museum of art or natural histroy (sic), library and/or for general recreational purposes in connection with the Memphis Park System, including parks adjacent thereto; and said second party, for itself and its successors, covenants and agrees that it will not use, nor suffer or permit said property be (sic) be used under its authority, for any other purpose that is objectionable or offensive to the residents in said community; and that in no event shall any part of said property be used in connection with any business for private pecuniary profit, but only and solely for public benefit, recreation and culture as aforesaid.

(d) In the event of a breach of either or any of the foregoing covenants or conditions in any substantial particular, and such breaches shall continue for a period of ninety days after written notice to Memphis Park Commission, or to the commission, board or official to whom its functions may hereafter be delegated, and after a copy of said notice shall be delivered to the Mayor or other chief official of the party of the second part, or its successor, such notice specifying the breach complained of, and for which forfeiture is sought, then the foregoing dedication or conveyance shall be and become

The "Advisory Board Memphis Museum" recommended to the Memphis Park Commission on January 6, 1959 that the Museum property be sold for residential purposes and that a new Museum be built on other City property. In response to this request, J. S. Allen, Esquire, the then Park Commission Attorney, submitted comprehensive report and summary of titles to the property involved and stated in his report dated February 5, 1959 "that neither the City nor the Park Commission could safely sell or cease the use for museum or park purposes as to any of the respective properties conveyed by these deeds.

Said report and opinion was made before the present lawsuit was filed (App. 112a).

Respondents' present policy with reference to "Pink Palace Museum" is not based upon any effort to deny Negro citizens of Memphis the right to use of this facility, but rather is based upon a policy of attempting to preserve title to the property. Respondents have evinced a willingness to remove all race restrictions obtaining at said Museum, except for the fact that they feel a removal of all restrictions based on race might result in a loss of this valuable property to the City and the Park Commission (App. 112a, 113a).

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void at the option or election of said party of the first part, or its assigns; and in such event if said breach is not remedied and corrected within said period of ninety days, the party of the first part, or its assigns may re-enter and take possession of said mansion house and every part thereof, including the aforedescribed parcel of land on which the same is located, and hold the same as of its first and former estate therein, with all additions or betterments, free of any claim of said second party, or its successors. Provided, such forfeiture shall not be permitted if such breach is wholly discontinued or remedied within said period of ninety days. A waiver for any period of time of a breach of either or any of the foregoing covenants and conditions in any particular shall not preclude a forfeiture for a continuance thereof after notice as above specified." (Exhibit 2.)

The lower Court, under doctrine of "abstention", stayed any adjudication with reference to said Museum and ordered respondents to file action in the Chancery Court of Shelby County, Tennessee, before September 15, 1961 to determine what effect integration of the races at said Museum will have upon the City's title (App. 120a). If the State Court holds that the City's title will not be affected by integration of the races, the plan of respondents to integrate "Pink Palace Museum" can be carried out and the District Court will not be called upon to make any adjudication in regard thereto.[5]

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[5] Original Bill for Declaratory Judgment, pursuant to the lower Court's mandate, was filed in the Chancery Court of Shelby County, Tennessee, on September 1, 1961, cause number 64064-2 R. D. The relief therein sought is a declaratory judgment decreeing that respondents may remove all restrictions based on race in the use and enjoyment of "Pink Palace Museum" and certain adjacent properties without jeopardizing or impairing title of the City of Memphis to the properties in question

ARGUMENT.

Petitioners perfected their appeal to the Court of Appeals before the Trial Court had an opportunity to pass on respondents' plan for integration of playgrounds and community centers. The District Judge, in line with the policy followed in **Kelley v. Board of Education of City of Nashville, 270 Fed. 2d 209 (6th Cir., 1959), cert. den. 361 U. S. 924,** ordered respondents to submit a more complete plan by December 15, 1961. In view of the appeal, of course, the hand of the Trial Judge has been stayed; and in this state of the record it would, therefore, seem that petitioners are not in any position to insist that respondents' plan for gradual desegregation is inadequate or incomplete.

The question presented to the Court of Appeals and to this Court thus narrows itself to the proposition of whether the District Judge, as a matter of law, was compelled to enter an order requiring respondents to integrate the races immediately in all public parks and recreational facilities of the City of Memphis, notwithstanding the undisputed proof that it would be manifestly unwise to do so.

The crux of petitioners' argument is that the Trial Judge and the Court of Appeals had no discretion in framing a decree in a suit of this character; and that the traditional rules of equity, which obtain in injunction cases and which are recognized in **Brown v. Board of Education of Topeka, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083** (second decision decided May 31, 1955), do not apply in the field of public parks and recreation. The authority cited by petitioners is **Florida ex rel. Hawkins v. Board of Control, 350 U. S. 413 (1956),** in which the Court held "our second decision in the Brown case * * * had no application to a case involving a Negro applying for admission to a state law school."

Petitioners also rely upon **Sweatt v. Painter, 339 U. S. 629,** which again involved the right of a Negro to attend a state law school.

It is respectfully submitted that the authorities relied upon by petitioners are not in point. No reason for delay was advanced in the law school cases.

The principles announced in **Brown v. Board of Education,** supra, and further elaborated on in **Aaron v. Cooper, 243 Fed. 2d 361 (8th Cir., 1957),** and **Kelley v. Board of Education of City of Nashville,** supra, seem most appropriate here. In approving the Nashville plan of gradual integration of the public schools, the Court in the **Kelley Case,** said at **270 Fed. 2d at pages 225 and 227**:

> "Cases involving desegregation, like other cases, depend largely on the facts. While the law has been stated, perhaps, as definitely as it can be stated at the present time, by the Supreme Court, nevertheless, its application depends upon the facts of each particular case. '[Because] of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity.' Brown v. Board of Education, 347 U. S. 483, 495, 74 S. Ct. 686, 692, 98 L. Ed. 873. 'Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.' • • •
>
> "'In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Tra-

ditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' Brown v. Board of Education, 349 U. S. 294, 299, 300, 75 S. Ct. 753, 765, 99 L. Ed. 1083. The court further went on to say that at stake was the personal interest of the plaintiffs in admission to the public schools as soon as possible on a non-discriminatory basis; that effectuating this interest may call for elimination of a variety of obstacles in making the transition; that courts of equity may properly take into consideration the public interest in the elimination of such obstacles; that, once a start is made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

* * * * * * *

"The complaint of appellants is that the plan does not conform to the mandate that desegregation take place with all deliberate speed. As Mr. Justice Frankfurter said in his concurring opinion in Cooper v. Aaron, supra [358 U. S. 1, 78 S. Ct. 1412]: 'Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.' In the Court of Appeals, in Aaron v. Cooper, 8 Cir., 243 F. 2d 361, it was observed that a reasonable amount of time to effect complete integration, in certain places, might be unreasonable in other places. It was said, in another case, that 'a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification of race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appear to be helpful in avoiding unseemly confusion and turmoil.' Orleans Parish School Board v. Bush, 5 Cir., 242 F. 2d 156, 166."

In **City of Montgomery v. Gilmore, 277 Fed. 2d 364 (5th Cir., 1960)**, the Court expressly held that the principles announced in the second Brown decision should be used by trial courts in formulating decrees with respect to desegregation of public parks and recreational facilities. In that case the Court of Appeals modified the lower Court's injunction so as to empower the Trial Court to vacate injunction requiring the City of Montgomery to operate all parks on a desegregated basis "in the event it should appear that the defendants may be able to plan and act more effectively so as to reopen and operate the parks within the framework of the Constitution if they are freed from the restraining effects of the injunction." (277 Fed. 2d at p. 368.)

The principle of planned gradual integration in public parks and recreational facilities is also recognized in **Cummings v. City of Charleston, 288 Fed. 2d 817 (4th Cir., 1961).** In that case Negro citizens of Charleston sought immediate access to one municipal golf course. No other public facilities were involved. In holding that no delay (beyond six months from date of lower Court's final decision) was authorized, the Court said at **288 Fed. 2d at p. 817:**

> "We have searched the record and have found no evidence which would tend to explain the postponement of the effective date of the injunction order for what would seem to be an unreasonable period of time. **We do not hold or even intimate that, if justifying circumstances were made to appear, the trial court could not exercise its sound discretion.** But it is not apparent from the record that any real administrative or other problems are here involved such as are present in some of the school desegregation cases. Indeed, the record discloses nothing which would indicate that the injunction

could not have been made immediately effective." (Emphasis supplied.)

The principle of gradual integration, as announced by this Court in the **Brown case**, has also been applied in the field of public housing in the City of Detroit. Cf. **Detroit Housing Commission v. Lewis, 226 Fed. 2d 180 (6th Cir., 1955).**

In considering the action of the Trial Court in denying the application for injunction, it should be borne in mind that upon appeal the ruling of the lower Court will not be disturbed unless contrary to some rule of equity or the result of improvident exercise of judicial discretion. **Meccano, Ltd. v. John Wanamaker, 253 U. S. 136, 141, 40 S. Ct. 463, 64 L. Ed. 822; National Fire Ins. Co. of Hartford v. Thompson, 281 U. S. 331, 338, 50 S. Ct. 288, 74 L. Ed. 881.** The discretion of the District Judge is necessarily broad and a strong showing of abuse must be made to reverse it. **United States v. W. T. Grant Co., 345 U. S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303.**

It would seem that had the lower Court issued injunction as prayed for, under the undisputed proof as shown in this record, it would have been an abuse of discretion. Cf. **Rippy v. Borders, 250 Fed. 2d 690 (5th Cir., 1957).**

Respondents recognize that the Memphis Park System and its recreational facilities must under established law be operated on a desegregated basis and that the former system must be changed in compliance with the law as announced by the Supreme Court. The only question herein involved is the manner in which this desegregation should take place. All of the proof introduced upon the trial supports the conclusion that gradual integration, as opposed to immediate integration, is in the best interest of all the citizens of Memphis, both White and Negro. No proof was introduced by the petitioners to support

their contention that immediate integration is the proper method of complying with the law as set forth in the **Brown** and other cases.

Petitioners' argument that a different rule of equity practice should apply to public parks and recreational systems, than is applied in public educational systems, seems untenable on its face. Manifestly, in view of the large numbers of people involved with respect to the Memphis Park System, there will be problems inherent in any transition from a segregated to a desegregated system. Those problems were carefully covered by the Trial Court and the Court of Appeals.

Pink Palace Museum.

If the State Court declares, in suit now pending, that integration of the races at "Pink Palace Museum" will not jeopardize the City's title to the property, there will be no occasion for intervention of the Federal Court, with respect to that facility, and respondents' plan in regard thereto can be carried out promptly.

Whether there now exists, in any person, firm or corporation a right of re-entry or right to claim a forfeiture of the Museum property, for condition broken, is a question of State law. In **Charlotte Park & Recreation Commission v. Barringer, 242 N. C. 311, 88 S. E. 2d 114 (1955)**, a similar provision was held to be valid and the United States Supreme Court denied certiorari, **350 U. S. 983 (1956)**.

Under applicable Tennessee decisions, however, it would appear that probably no one has an enforceable right of re-entry, for condition broken, with respect to the Museum property. See **Board v. Baker, 124 Tenn. 39, 134 S. W. 863 (1910); Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S. W. 36 (1924)**. The question presented for determination

in the State Court, however, is, obviously, fraught with complexities and difficulties, and cannot be safely resolved without final adjudication.

If the State Court holds that there is presently an enforceable right of re-entry, for condition broken, with respect to the Museum, and the City is unable to acquire such right of re-entry from the holder of such right, then the constitutional question thereby presented can be determined by the Federal courts.

The action of the Trial Judge in this case is in line with many recent decisions of the United States Supreme Court, including cases involving questions of civil rights. **Harrison v. NAACP (1959), 360 U. S. 167, 3 L. Ed. 2d 1152, 79 S. Ct. 1925; Thibodaux v. Louisiana Power & Light Co. (1959), 360 U. S. 25, 3 L. Ed. 2d 1058, 79 S. Ct. 1070; Meridian v. Southern Bell Telephone & Telegraph Co. (1959), 358 U. S. 639, 3 L. Ed. 2d 562, 79 S. Ct. 455.**

The authority of the District Judge to apply doctrine of "abstention" to present situation is exhaustively covered in annotation entitled "Discretion of federal court to remit relevant state issues to state court in which no action is pending." **3 L. Ed. 2d 1827.**

A clear statement of principle herein involved is set out in the **City of Meridian case**, where the Court said at **358 U. S., pp. 640-641:**

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. See Railroad Com. v. Pullman Co., 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643. That is especially desirable where the questions of state law are enmeshed with federal questions.

> Spector Motor Service, Inc., v. McLaughlin, 323 U. S. 101, 105, 89 L. Ed. 101, 103, 65 S. Ct. 152. Here the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. Ct. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483, 84 L. Ed. 876, 880, 60 S. Ct. 628. In such a case when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."

In **Harrison v. NAACP**, supra, the Supreme Court held that the District Court should have abstained from ruling on constitutionality of Virginia statutes until a construction of the statutes could be made by the Virginia courts "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." In that case the Court said:

> "This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See Chicago v. Fielderest Dairies, Inc., supra (316 U. S. at 172, 173)."
>
> **(360 U. S. at p. 177.)**

CONCLUSION.

The Trial Court and the Court of Appeals have found that respondents have acted and are acting in good faith in attempting to comply, in the field of recreation, with the opinion of the Supreme Court in the **Brown case**.

The Court of Appeals has held that "there was a proper exercise of discretion by the District Court in denying injunctive relief, in providing for a plan of desegregation to be filed by the Park Commission with the court, and in reserving jurisdiction for further proceedings in the case; * * *." Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX FOR RESPONDENTS.

OPINION OF TRIAL COURT.

(Docket No. 9, Part of Judgment; Transcript of Evidence, p. 268 et seq., Docket No. 12.)

The Court: Gentlemen, we have had a full hearing today of all the matters involved, and here briefly are the Court's views.

The plaintiffs, invoking the Court's injunctive powers, are asking in this proceeding that the defendants be enjoined forthwith from operating certain public facilities under the jurisdiction of the Park Commission of the City of Memphis, including golf courses, tennis courts, playgrounds, parks, and the Pink Palace Museum, upon a racially segregated basis.

Restrictions on a number of the facilities here involved, including the Brooks Memorial Art Gallery, the boat dock at McKellar Lake, and the zoo, were lifted some time ago.

At least twenty-one parks, I believe, are now open to general use without restriction.

Now, the defendants are voluntarily proposing in this proceeding to remove the restrictions with respect to the amusement facilities at the Fairgrounds, and all municipal golf courses, according to a plan which they claim is necessary to an orderly transition of its heretofore segregated system to one which will admit all comers without regard to race or color.

The defendants seem to have no objection to a removal of the restrictions with respect to the Pink Palace Museum, but because of certain expressed conditions in the deed conveying this property to the city over thirty-five years ago, there is a risk which might result in a reverter to the original grantor, or its successors. That is, in the event of the integration of that facility. With respect to

this particular facility, the defendants are requesting of the Court at this time that the legal questions involved be left to the state courts for a ruling under the doctrine of abstention.

Now, the City of Memphis, through its Park Commission, carries on a very large and extensive operation in the City of Memphis. Its activities are many and varied. All things considered, the plan it proposes in this proceeding to take care of the Fairgrounds amusement facilities and the golf courses the Court is convinced is about as good as can be devised. In getting up this plan, many things necessarily had to be considered. The effective dates with respect to one or two of the golf courses are projected into the future to some extent, but the whole program under the plan, as the Court understands, may and will be accelerated in the light of new developments. The Court is well satisfied it is the purpose of the defendants to do this with all deliberate speed.

Of course, in passing upon this plan, local conditions to be encountered with respect to maintenance of law and order, the avoidance of violence and confusion in the community, revenues available from concessions, though not absolutely controlling, may, among many other things, as practical matters be weighed and considered by the Court on application for an injunction of the type here sought. Time to organize the change-over to integration after all of these years is to the Court important. The legal rights of all citizens, white and colored, are not to be overlooked in what we do here today.

Apparently the defendants have given consideration to these matters. And they, as I say, are matters for the Court to consider on application for the injunctive relief sought.

It is true no case dealing with a plan or program of integration of facilities as here involved is cited, but

we do know that our Court of Appeals in Kelly against the Nashville Board of Education, cited by the defendants, approved a so-called stairstep plan for integrating the Nashville schools. The reason in that case seems to the Court to have application in this case. The problems here are somewhat comparable to the problems faced by the Nashville schools.

No valid objection to this plan in the Court's opinion is offered in this case. The plaintiffs merely say they want all of these facilities fully integrated now. Nothing else seems to matter.

The Court believes that good will and understanding between the races in this city can be best preserved and promoted by the plan here suggested by the defendants. The defendants, who are high minded public officials, have put much thought and effort into this plan. It is sound, fair, feasible and equitable. It is reasonable and within the spirit of the law, and the Court is convinced is proposed in utmost good faith. The Court approves it in all things.

It should be stated here that pending the transition period under the plan offered, no citizen will be deprived of his right to play golf or to avail himself of other activities sponsored by the Memphis Park Commission.

With respect to the Pink Palace Museum, the Court thinks it wise that it stay any adjudication which might affect the title to this valuable property until the state courts can have an opportunity to decide the complex questions involved. The doctrine of abstention in matters of this nature of course has been recognized by the courts, including the Supreme Court, many times.

The Court thinks the defendants, however, should take the initiative on this particular matter and get a suit under the declaratory judgment act of Tennessee filed in

the Shelby County Chancery Court. This should be done within ninety days. Incidentally, it occurs to the Court that additional parties will be necessary to a full adjudication of the matter. But this, of course, will be left for you lawyers to decide.

The John Rogers tennis courts on Jefferson Avenue in all probability will be abandoned as such at an early date before the year is out according to the proof, since the ground upon which they stand, presently owned by the City of Memphis, is too valuable for the purpose for which they are presently being used and plans are on foot to sell the property. The Court suggests to the defendants under their over-all plan that they consider opening up these particular facilities by January 1, 1962, on an integrated basis if the property has not been disposed of by the City or the tennis courts at that location are not abandoned.

Now, no plan is offered in this proceeding concerning the integration of other recreational facilities of the Park Commission. That is, the playgrounds and community centers. The proof is that integration of the races and utilization of these facilities is a matter which in the interest of all the citizens of Memphis calls for more study. The defendants are not prepared to offer a plan to cover this highly important phase of the Park Commission's activities at this time. The Superintendent of this department has been asked by the Park Commission to get up a plan which will accomplish this objective. The proof is that a target date for such integration of the races in the use of these particular facilities cannot be set at this time. As the Court understands, additional time is necessary for additional study and planning for an orderly transition of these activities on an integrated basis.

The Court in the circumstances will not order through injunction at this time the immediate integration of these

particular recreational facilities of the Memphis Park Commission. It would be unwise for the Court to do so for many reasons. Additional time in the Court's opinion is of the essence. It is absolutely necessary for a full consideration of this troublesome matter by the defendants so that adequate plans for the transition may be devised and agreed upon.

The Court will hold this case open so that these particular matters can be given further study and consideration by the Board of Park Commissioners. The proof is that something in the way of a plan could be ready for submission to the Court in approximately one to two years. The Court in the circumstances does invite the Department to submit such a plan in this proceeding, but thinks this should be done within a period of six months.

Since the defendants have been acting for some time on a voluntary basis and have desegregated a number of its facilities, and are in perfect good faith proceeding in an orderly and effective manner to complete the whole job with respect to those remaining which are here involved, the Court rules that an injunction is unnecessary.

So, gentlemen, get up a judgment right away approving the plan submitted with respect to the Fairgrounds and the golf courses and sustaining the defendants' request for stay with respect to the Pink Palace Museum, so that the state courts may pass upon the questions there involved.

The judgment should also provide for the filing of a plan with respect to the playgrounds and community centers within six months.

The costs in this proceeding will be equally divided between the plaintiffs and defendants.

Now, the Court in these remarks has only hit the high spots. They will serve, at least temporarily, as the Court's

findings and conclusions under the rules. Others in more detail will probably be necessary, so the Court suggests you gentlemen who represent the defendants might within the next week get up additional ones to be filed with the Court. The Court will need an original and about five copies.

Counsel for the plaintiffs may if they desire also propose findings and conclusions to the Court.

All right, if there is nothing further, Mr. Clerk, adjourn court until tomorrow morning at nine-thirty.